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ABSTRACT

There is considerable debate on and off campus about the extent to which student editors and reporters can legitimately express controversial views and whether they may use allegedly indecent words; and whether university and college administrators can censor or suppress student publications unacceptable to them. This paper reviews some of the cases of freedom of the college and high school student press and court pronouncements related to these issues. Cases discussed are: (1) the publication and censoring of an Eldridge Cleaver article at Fitchburg State College in Massachusetts; (2) the publication of an article critical of state officials at Troy State University in Alabama, and the subsequent dismissal of the paper's editor; (3) refusal by campus papers to accept paid advertisements designed to promote social or political views; and (4) situations in which students were punished and expelled for distributing pamphlets critical of the administration or other officials. Court decisions held that in all cases students were entitled to due process. (AF)

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FREEDOM OF THE COLLEGE STUDENT PRESS

Among other changes accompanying the current "revolution" in campus life are new court pronouncements of how far student editors and reporters can legitimately go in expressing controversial views or allegedly indecent words; and how far university and college administrators can go in censoring or suppressing student publications unacceptable to them.

One view is that a student newspaper should be a forum for many types of controverted social and political issues (within necessary limits of "time, place, and manner"); that it should be lively and intellectually challenging. Thus it may in itself be an important educational agency, not only for its own staff, but for all who read it thoughtfully.

An opposite belief is that the copy of student publications should be pre-censored by some faculty or administrative authority, and purged of anything that might be feared to be offensive to members of the "establishment" in the community or state, or contrary to strongly-held predilections of any influential class of readers. Someone has pointedly said "Reading a student newspaper is often a good deal like being immersed in a vat of lukewarm molasses."

A New York Times story of December 2, 1969 under the byline of Robert Reinhold bore the headline "Campus editors now say what

they think." It reported primarily recent events at Fitchburg State College in Massachusetts, but touched occurrences at many other institutions in other states. Nelly Jo Lee of the United States Student Press Association was reported to have said "Activist newspapers... are saying that there is no such thing as objectivity and that any story is going to be somewhat subjective. The college press is trying to give a side that frequently isn't given in the professional press."

Massachusetts State Colleges

At Fitchburg State College in Massachusetts the student newspaper was called "Kampus Vue" and was "primarily on student news and campus events" until John Antonelli was elected by the student body as editor-in-chief. He changed the name to "The Cycle" and broadened the focus, "to explore and comment on areas of broader social and political impact." The paper depended on an allocation of some of the receipts from compulsory student activity fees. Under a state statute these fees and any receipts from the activities themselves are retained in a revolving fund to be expended "as the president of the college may direct in furthering the activities..." 1/

On September 21, 1969 the copy of Eldridge Cleaver's article "Black Moochie" (originally published in Ramparts Magazine) was sent to the usual printer of "The Cycle" to be included in the forthcoming issue. The printer, whose daughter was a student at the college, objected to the theme and the four-letter words, refused to print the article and telephoned the college president, James J. Hammond.

1/ Massachusetts General Laws, chapter 73, sec. 1B.

The president withheld payment for the printing of that issue of "The Cycle" and said he would refuse to allow future editions to be published unless he or his representatives gave prior approval to all the copy before it was printed.

In fact the issue containing "Black Moochie" was printed by another printer, paid out of funds raised by students at four of the other state colleges in Massachusetts, and widely circulated. Antonelli agreed for the time being to cooperate with a board of two professors set by the president to censor materials intended for publication; but within a month or two he and his staff disagreed with these two professors over budget matters, and all submitted their resignations. Antonelli then sued in federal district court for an injunction and a declaratory judgment that the announced plan of censoring was unconstiututonal under the First Amendment guarantee of free speech and press.

District Judge W. Arthur Garrity, Jr., granted no injunction against President Hammond, because he regarded him as "a highly placed and responsible public official, and there is no reason to believe he will not abide by the law as herein declared." He made the declaratory judgment, however: "The exercise of rights by individuals must yield when they are incompatible with the school's obligation to maintain the order and discipline necessary for the success of the educational process. However, any infringement of individual constitutional freedoms must be adequately related to this legitimate interest. No such justification has been shown in this case."

He continued: "The university setting of college-age students being exposed to a wide range of intellectual experience creates a relatively mature marketplace for the interchange of ideas so that the free speech clause of the First Amendment with its underlying assumption that there is positive social value in an open forum seems particularly appropriate."

The Massachusetts statute authorizing the president to direct the expenditure of student activity funds does not empower him to dictate directly the content or substance of the activities, decided Judge Garrity. Said he: "We are well beyond the belief that any manner of state regulation is permissible simply because it involves an activity which is a part of the university structure and is financed with funds controlled by the administration. The state is not necessarily the unrestrained master of what it creates and fosters."

He thought "It may be lawful in the interest of providing students with opportunity to develop their own writing and journalistic skills, to restrict publication in a campus newspaper to articles written by students. Such a restriction might be reasonably related to the educational process. But to tell a student what thoughts he may communicate is another matter. Having fostered a campus newspaper, the state may not impose arbitrary restrictions on the matter to be communicated." 2/

2/ Antonelli v. Hammond, (U.S.D.C.,Mass.) 308 F. Supp. 1329 (1970).

This ratio decidendi was reinforced by a quotation from the opinion of the United States Supreme Court in the recent decision holding that high school students could not be prohibited from wearing black armbands as a sign of mourning for the Viet Nam war, so long as this was not shown to cause any disorder or disruption of the work of the school, or any invasion of the rights of other pupils:

"In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[3/]

The Case in Alabama

Some three years earlier a somewhat similar case had been decided by a federal district court in Alabama, with similar result. Troy State University in Alabama maintained a rule that the student newspaper should not publish anything adversely critical of the governor or the legislature of the state. Gary Clinton Dickey, student editor of the "Tropolitan", the campus newspaper, wrote an editorial in support of President Frank A. Rose of the University of Alabama, who had taken a strong stand for freedom of speech and press at that institution, and as a result had become a target of criticism and harassment from some members of the legislature and some newspaper editors in the state.

3/ Quoted from Tinker v. Des Moines Public School District, 393 U.S. 511, 89 S. Ct. 739 (1969).

Specifically, President Rose had defended the publication of a document which served as the program of a two-day meeting at the University on "A World in Revolution" and contained the names and excerpts from the words of such speakers as Dean Rusk (keynoter), James Reston, General Earle G. Wheeler, Roy Wilkins, Bettina Aptheker, and Stokely Carmichael.

Dickey's editorial was well-written and in good taste. It was entitled "A Lament for Dr. Rose", and concluded by saying "The Tropolitan, therefore, laments the misinterpretation of the program by members of the legislature, and the considerable harassment they have caused Dr. Rose. It is our hope that this episode does not impair his effective leadership at the University or discourage him in his difficult task."

A professor of English at Troy assured Dickey that the piece was worthy of publication, but both the faculty adviser of "The Tropolitan" and President Ralph W. Adams forbade his publishing it, on the basis of the rule that the governor and members of the legislature are never to be criticized, because the institution belongs to the state, and a newspaper can not criticize its owners!

The faculty adviser gave Dickey some copy to use instead, under the caption "Raising Dogs in North Carolina". Dickey let his own caption stand and left the space below it blank except for the word "Censored" printed diagonally across it; and thus the paper appeared.

Troy State University first notified Dickey that he was suspended for "insubordination", without giving him any prior notice or hearing; and upon being ordered by the U.S. district court to rescind that sus-

pension and afford him an administrative hearing, did so, with the same result. Dickey then asked the court for an injunction. Chief Judge Frank M. Johnson, after receiving the pleadings and taking evidence orally in court, declared the suspension unconstitutional and void, and ordered it rescinded. He also granted the injunction. 4/

The judge explained that Troy State University was under no legal obligation to permit Dickey to continue as editor, nor even under any compulsion to continue publishing a campus newspaper; but "Since this state-supported institution did elect to operate the 'Tropolitan' and did authorize Dickey to be one of its editors, they cannot as officials of the State of Alabama, without violating the First and Fourteenth Amendments, suspend or expel Dickey for his conduct as reflected in this case."

Put in another way: "State school officials can not infringe on their students' right of free expression as guaranteed by the Constitution where the exercise of such right does not 'materially and substantially interfere with requirements of appropriate discipline in the operation of the school.'" 5/

Troy State University, said Judge Johnson, "Cannot punish Gary Clinton Dickey for his exercise of this constitutionally guaranteed right by cloaking his expulsion or suspension in the robe of 'insubordination.'" In short, Dickey was in fact suspended for his exercise of his right of free expression. The court also quoted from the "flag-

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4/ Dickey v. Alabama State Board of Education, (U.S.D.C.,Ala.) 273 F. Supp. 619 (1967).

5/ Quoting Burnside v. Byars, (U.S.C.A.,5 Cir.), 363 F. 2d 744 (1966), upholding the right of black high school pupils to wear "freedom buttons" if this did not disrupt the school.

salute" decision of the United States Supreme Court[6] on the responsibilities of state school authorities:

"The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures--Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

The Alabama State Board of Education appealed the Dickey case, but the Fifth Circuit Court of Appeals hewed to the line of its perceived duty to dismiss it as moot after learning that Dickey did not intend to return to Troy State University. It refused to consider the merits, and ordered the judgment vacated, saying this was federal court custom in moot cases, and was not to be interpreted as an opinion for or against the judgment.[7]

Paid "Editorial Advertisements"

Distinct from the editorial and news content of a campus paper is the question of its acceptance of paid advertisements designed to promote social or political views. Of course the paper has a right to reject any and all paid advertising; but the courts have said that if it accepts paid commercial advertisements, then it can not refuse paid

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6/ West Virginia State Board of Education v. Barnette, 319 U.S.624 (1943).

7/ Alabama State Board of Education v. Dickey, postponed, (U.S.C.A,5 Cir.), 394 F. 2d 490 (1968), and declared moot, Troy State University v. Dickey, (U.S.C.A.,5 Cir.), 402 F 2d 515 (1968).

"editorial ads" without unconstitutionally restricting freedom of expression.

Students at the Wisconsin State University at Whitewater submitted three editorial advertisements to the campus newspaper, the "Royal Purple", requesting that they be published at the usual rates. The three ads dealt respectively with (1) a university employees' union, (2) problems of discrimination, and (3) race relations and the war in Viet Nam. The paper rejected all three.

When the case came before United States District Judge James E. Doyle at Madison, he concluded: "It is adjudged and declared that defendants (Regents of Wisconsin State Colleges) have unlawfully deprived plaintiffs (the students) of their rights of freedom of speech and expression by refusing to print the editorial advertisements submitted by plaintiffs, or by sanctioning such refusal.

"Plaintiffs' right to express their views on vital issues of the day should not be restricted unless a 'clear and present danger' to society is apparent... Defendants have not claimed that they would prove the existence of a clear and present danger and it is highly doubtful that they could. The only danger present here is the threat posed to plaintiffs' right to free speech."[8/]

Earlier in the same year (1969) a parallel case involving a high school in New Rochelle had been decided by another United States district

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8/ Lee v. Board of Regents of State Colleges, (U.S.D.C.,Wis.), 306 F. Supp. 1095 (1969).
Showing that the doctrine of "clear and present danger" is not new, but long-established, Judge Doyle cited Schenck v. United States, 249 U.S. 407, 39 S.Ct. 247,63 L.Ed.470 (1919) and Terminiello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

court. There District Judge Charles M. Metzner had said, of a proffered advertisement opposing the Vietnam war:

"There is no logical reason to permit news stories on the subject and preclude student advertising... The lawsuit arises at a time when many in the educational community oppose the tactics of the young in securing a political voice. It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted nondisruptive modes of communication, may be precluded from doing so by that same adult community."[9/]

Phamphleteering

A further variety of questions concerns the right of persons to put their views in writing and distribute them on the campus in the form of pamphlets, leaflets, or so-called "underground" newspapers.

Two such cases occured in two state universities in Tennessee. Both were appealed to the United States Supreme Court; but certain circumstances in both instances caused the high tribunal to decline to review, so that at this writing there is no Supreme Court decision on this issue.

Kenneth Jones and other students at Tennessee State University at Nashville (then known as Tennessee Agricultural and Industrial University) were suspended for writing and distributing on the campus a pamphlet attacking the administrative officers in intemperate terms and directly urging all students to boycott the registration of the fall of 1967. They had been given notice of charges and a hearing at the

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9/ Zucker v. Panitz, (U.S.D.C.,N.Y.), 299 F. Supp. 102 (1969).

University. Judge William E. Miller of the United States district court dismissed their complaint, and this judgment was affirmed by the United States Court of Appeals, in a short opinion by Circuit Judge Bert Combs. 10/

The Supreme Court granted certiorari, "primarily to consider the issues raised by Jones' claim that he had been separated solely because of his distribution of leaflets urging a boycott of fall registration"; but when the case came up a majority of the high court concluded: "after oral argument, and on closer review of the record, it emerges that Jones' suspension was based in part on a finding that he lied at the hearing. This sufficiently clouds the record to render the case an inappropriate vehicle for this court's first decision on the extent of First Amendment restrictions on the power of state universities to suspend students for expression of views alleged to be disruptive of the good order of the campus"; and dismissed the writ. Three of the Justices held different views. Mr. Justice Hugo L. Black would have affirmed the decision below. Justice William O. Douglas said the court should have reviewed the case, in a dissenting opinion in which he was joined by Justice William J. Brennan. 11/

The Douglas-Brennan dissent was cogent and convincing: "If he is to be expelled for lying, he is entitled to notice and opportunity to be heard on that charge....

"The circulation did not disrupt a classroom or any other university function. It would seem, therefore, that it is immune from punishment,

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10/ Jones v. State Board of Education of Tennessee, (U.S.D.C.,Tenn.), 279 F. Supp. 190 (1968); affirmed in (U.S.C.A.,6 Cir.), 407 F 2d 834 (1969).

11/ Certiorari granted, 396 U.S. 817(1969):writ dismissed,(Feb.24,1970).

censorship, or any form of retaliating action.

"Our failure to reverse is a serious setback for First Amendment rights in a troubled field.

"The leaflet now censored may be ill-tempered and in bad taste. But we recognized in Terminiello v. Chicago (337 U.S.1) that even strongly abusive utterances or publications, not merely polished and urbane pronouncements of dignified people, enjoy First Amendment protection: 'A function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.'"

At East Tennessee State University at Johnson City there was a similar incident in which Marietta Norton and other students wrote and distributed harshly-phrased pamphlets allegedly designed to incite violent disruption of the operation of the institution; and were suspended. Here United States District Judge W.E. Miller dismissed the complaint of the students, and this judgment was affirmed by the United States Court of Appeals in an opinion by Circuit Judge Paul C. Weick. However, a vigorous and lengthy dissent was entered by Circuit Judge Anthony J. Celebrezze. The pamphlets in question urged the students to "stand up and fight" and seemingly advised them to emulate the leaders of violent disorders at Berkeley and at Columbia University; and referred to local administrative officers as despots and "problem children" deserving to be reprimanded by students.

Though the language may have been false and inflammatory, there

was no sufficient evidence that distribution of the papers on campus would lead to an eruption or riot, or cause any substantial interference with the normal activities of the University, said Circuit Judge Celebrezze; and he thought the words, and the time, place, and manner of distribution were within the protection of the First Amendment.[12/]

The United States Supreme Court declined to review this decision, with Justices Thurgood Marshall, William O. Douglas, and William J. Brennan joining in dissent from the majority.[13/] Mr. Justice Marshall said the form, place, and manner of expression at issue here were within the protection of the Constitution, and the decision below should be reversed. He distinguished between "the burning of buildings and the peaceful but often unpleasantly sharp expressions of discontent."

Since there is as yet no Supreme Court decision based on a review of the merits of either of the cases that arose in Tennessee, the two decisions of the Court of Appeals stand as the law in the Sixth Circuit. Refusal by the Supreme Court to review these decisions does not imply that the high tribunal would affirm them; the sheer bulk of its business compels the court to reject most of the 3,000 requests for review that come to it each year.

In Illinois and Texas

Rather similar to the foregoing two cases is another in the Seventh Circuit, where a high school principal at Joliet, Illinois, handed his pupils a pamphlet "Report To Parents" with a request to

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12/ Dissenting opinion in Norton v. East Tennessee State University, (U.S.C.A.,6 Cir.), 419 F. 2d 195 (1969), affirming

13/ The recently-appointed Justice Harry Blackmun voted with the majority.

deliver it to their parents at home. Two students, Raymond Scoville and Arthur Breen, subsequently wrote and distributed a caustic criticism of the principal, the dean, and the pamphlet, and in which they strongly advised all pupils to refuse to accept, or "destroy if accepted, any propaganda whatsoever from the administration," and advocated disregard of school regulations. For this they were suspended and subsequently expelled.

Expulsion for this offense was adjudged proper by United States District Judge Napoli, and his judgment was affirmed by a panel of the United States Court of Appeals; but the Court of Appeals subsequently granted a rehearing en banc and reversed and remanded the judgment in an opinion by Circuit Judge Roger J. Kiley. Circuit Judge Latham Castle entered a dissent.

Judge Kiley was convinced that the facts of this case afforded no basis for any reasonable inference that any substantial disruption of the operation of the school would result. Said he: "While recognizing the need of effective discipline in operating schools, the law requires that the school rules be related to the state interest in the production of well-trained intellects with constructive critical stances, lest students' imaginations, intellects and wills be unduly stifled or chilled. Schools are increasingly accepting student criticism as a worthwhile influence in school administration."

He concluded that further proceedings should be had in the district court to determine whether the "forecast" of disruption was justified in fact; and if not, then Scoville and Breen were entitled to the declaratory judgment, injunctive and damage relief sought.[14/]

14/ Scoville v. Board of Education of Joliet Township, (U.S.C.A.,7Cir.), 425 F. 2d 10(1970);reversing (U.S.D.C.,Ill.) 286 F. Supp. 988 (1968).

Much the same denouement occurred in the case of a high school in Houston, Texas, where Dan Sullivan and Mike Fischer, boys in the senior class, became concerned with what seemed to them to be unnecessary and capricious repression and low morale in the school, and so wrote and had printed and distributed (out of school hours and off the school premises) three issues of an "underground newspaper" called the "Pflashlyte" in which the administration of the school was rather crudely criticized and argument was made for more harmony among students, faculty, and administration. A case was also made for constitutional free speech and press, based on some research in the legal sources.

The distribution was apparently made in a public park near the school, and pupils were asked not to take the papers into the school; or if they did so, to keep them concealed. Nevertheless some of the papers found their way into the building and a few were seen in the hands of pupils in classrooms, and in half a dozen instances teachers took them from the pupils without classroom disruption. In a few instances pupils asked a teacher to conduct a discussion of the paper during class time, and were refused.

After a few days of sleuthing the principal identified the two boys, who readily admitted they were the "editors". (The principal's alarm was somewhat escalated by the unfortunate fact that the printing was done at the University of Houston, a state university, on a work-order signed by the Students for Democratic Action, then a recognized student organization at the University; and that, contrary to the wishes of the two boys and without their order or consent, the initials "S.D.S." were printed on the issues.)

Without further process the principal immediately told the two

boys and their parents that they were suspended for the remainder of the year, and advised them that their only recourse would be to try to gain admission to some other high school in the Houston district. When they took their case to the United States district court, District Judge Woodrow B. Seals first immediately ordered their temporary reinstatement because they had been suspended without any semblance of due process; and then advanced the study of the facts and the law involved in order to afford a prompt decision on the plea for an injunction and a declaratory judgment.

His expedited memorandum opinion was a judgment in favor of the students, declaring the only applicable written regulation of the Houston Board of Education (which merely authorized the principal of a high school to make and enforce "rules necessary and in the best interests of the school") to be unconstitutional and void for vagueness and overbreadth; and granting an injunction preventing the use of this rule in the future, and prohibiting the imposition "of serious disciplinary sanctions, in the absence of precise and narrowly drawn regulations, upon students who write, print, distrbute or otherwise engage in the publication of newspapers either on or off the school premises during either school hours or non-school hours unless such activities materially and substantially disrupt the normal operations of the school."[15/]

The permanent injunction also forbade the suspension or expulsion for a substantial period of time of secondary school students in the Houston school district who are guilty of any misconduct, without compliance

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15/ Sullivan v. Houston Independent School District, (U.S.D.C.,Tex.), 307 F. Supp. 1328 (1969).

with minimal standards of due process: (1) formal written notice of charges and evidence, (2) formal hearing with opportunity to introduce witnesses and other evidence, and (3) decision to be solely on the basis of substantial evidence.

The opinion itself requires approximately 12,000 words. Appended also are some 4,000 words of "Pflashlyte", and a copy of the judge's "Oral and Informal Findings of Fact and Conclusions of Law" made April 15, 1969, seven months before the date of the court's formal final judgment. Taken together, these documents provide an informative record.

They stimulate me to make an assertion which I think is needed. Morale is not as high as it should be in many high schools and colleges. There is hostility among students and teachers and administrators. Many students are more or less rebellious against "the system". It is neither fair nor correct to blame students, teachers, or administrators for these unhappy facts; and assessing of blame will bring no cure. Repression is not the answer. It is fortunate that the courts now seem to be saying that suppression of the constitutional rights of students will no longer be tolerated.

The root of the trouble is that in many high schools and colleges great crowds of thousands of students are shepherded by only half enough teachers and counselors, so that opportunity for decent and humane person-to-person relationships scarcely exists. Huge overcrowded school buildings are operated somewhat like prisons. Teachers almost unavoidably acquire some of the characteristics of a drill-sergeant of Marines, and administrators feel compelled to perform the functions of complainant, judge, jury, and probation officer, to say nothing of colonel of a regimental combat team.

Twice as many teachers as are now on duty are needed, and better-educated teachers. These could include many trained paraprofessional assistant teachers to help with the debilitating burden of clerical work as well as some tutoring of slow learners. The same applies to administrators. They should be better-educated, including some knowledge of the constitutional freedoms of American citizens, and there should be more of them. Thus schools and colleges can fulfill their highest potentials.

Yet we now hear of a "surplus of teachers" over the next few years, and a "glut of doctoral degree holders". In the wealthiest nation on earth, this talk flows from inverted and perverted reasoning which would lead to the missing of the greatest opportunity of the century. The facts of the birth-rate prior to about 1960 make it virtually certain that high school enrollments will continue to grow until about 1978, and college enrollments until about 1982. We have just come through a decade of enormous growth. The expansion of numbers will continue for another decade. What of the improvement of quality? Taxpayers and private donors have earned praise for good support, but we have had to improvise in many ways and "muddle through" under the weight of increasing enrollments. Now, for the first time in many years, it may be possible to have enough well-educated teachers to staff the schools and colleges. Shall we think of the enterprise as though it were permanently frozen in its present mold, and say we have a "surplus" of teachers? This could become a self-fulfilling prophecy if it is not scuttled. The great opportunity is coming to put to work twice as many teachers as we now have, and better-educated. There isn't much wrong with schools and colleges that would not be helped by this strategy.